Supreme Court, U.S.
FILED

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

Jerome S. Wagshal,

Petitioner,

v.

Mark W. Foster, et al.

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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** A member of the Bar of this Court, acting as counsel of record*

December 14, 1994 (Revised)

QUESTION PRESENTED FOR REVIEW

What kind, if any, of judicially created immunity from civil suit should be conferred on a court-appointed mediator, and specifically:

a. Is a mediator entitled to (i) absolute "quasi-judicial" immunity or (ii) qualified immunity, and, regardless of which,

b. when the mediator deliberately acts beyond his authority and function by making adversarial recommendations to the appointing court and critical public statements about one of the parties to the mediation based on supposedly confidential information gleaned from the mediation, should the mediator be given immunity from civil suit by a party injured by the mediator's actions?

PARTIES IN THE PROCEEDINGS BELOW

Petitioner Jerome S. Wagshal was the plaintiff in the United States District Court for the District of Columbia, and the appellant in the United States Court of Appeals for the District of Columbia Circuit

Respondents, who were defendants in the United States District Court for the District of Columbia, and appellees in the United States Court of Appeals for the District of Columbia Circuit, are: Mark W. Foster, and his partners: Roger E. Zuckerman, Roger C. Spaeder, Bruce Goldstein, William W. Taylor III, Peter R. Kolker, Janet M. Meiburger, Stephen H. Glickman, Lawrence A. Katz, Anthony Thompson, Nelson C. Cohen, Steven M. Salky, Edward C. Berkowitz, Judith Sturtz Karp, Donald J. McCartney, Eric F. Facer, and Marshall S. Wolff.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES vi

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED 1

STATEMENT OF THE CASE 1

Nature Of The Case 1

Statement Of Facts 4

A. The two documents Which Established Foster's Obligations. 8

B. Foster's Two Letters Which Violated His Obligations 9

Course of Proceedings and Disposition In The Courts Below 18

BASIS OF JURISDICTION IN THE DISTRICT COURT 24

REASONS FOR GRANTING THE WRIT 24

Introductory Statement 24

I. There Is Obvious Unequal Treatment Where Mediators Are Given Absolute Immunity Which Is Denied To More Senior Officials In The Other Branches Of Government..... 28

II. Review By This Court Is Necessary To Bring The Law Regarding Mediators Into Conformity With The Principle Of Functional Analysis Which Is The Touchstone For Deciding Immunity Issues..... 31

A. The Principle Of Functional Analysis Must Govern 31

B. Whenever This Court Has Granted Absolute Immunity In Connection With Judicial Actions, It Has Premised The Grant On Finding Adjudicatory Functions, And Mediators Exercise No Adjudicatory Functions 32

C. Traditional Common-Law Historical Precedent Is A Strong Guide In Making A Functional Analysis, And There Is No Common-Law Precedent For Granting A Mediator Absolute "Quasi-Judicial" Immunity..... 41

D. The Court of Appeals Misapplied The Principle of Functional Analysis In Granting Mediators Absolute Immunity 45

III. This Case Provides A Precise Opportunity For This Court To Clarify The End Point Of A Grant Of Immunity, That Is, When, By Functional Analysis, Even Absolute Immunity Is Lost 50

A. Clarification Is Needed Of Past Decisions By This Court Regarding The Consequences When An Official Acts "Outside The Scope" Of His Duties 51

B. Clarification Is Needed As To When Immunity Ceases After The Immunized Official Leaves Office 53

IV. REVIEW BY THIS COURT IS CALLED FOR BY IMPORTANT PUBLIC POLICY CONSIDERATIONS... 55

CONCLUSION 58

APPENDICES - SEPARATE VOLUME

APPENDIX A (Opinion of the Court of Appeals)..... ..... A-1

APPENDIX B (Opinion of the District Court) B-1

APPENDIX C (Order denying Rehearing).... C-1

APPENDIX D (Order appointing Foster).... D-1

APPENDIX E (Statement of Understanding.. E-1

APPENDIX F (Foster letter to the Court). F-1

Appendix G (Foster letter to counsel)... G-1

TABLE OF AUTHORITIES

PAGE

CASES

Antoine v. Byers & Anderson, Inc., __U.S.__, 113 S.Ct. 2167 (1993) 42

Briscoe v. LaHue, 460 U.S. 322 (1983).... 32

Burns v. Reed, 500 U.S. 478 (1991) 30, 32, 42, 49

Butz v. Economou, 438 U.S. 478 (1978). 30, 32

Buckley v. Fitzsimmons, __U.S.__, 113 S.Ct. 2606 (1993)..... 30, 33, 41, 42, 44, 49, 56

Cleavinger v. Saxner, 474 U.S. 193 (1985) 32, 34, 42, 43, 47, 51

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) 36

Ex parte Virginia, 100 U.S. (10 Otto) 339 (1880) 35

Forrester v. White, 484 U.S. 222 (1988) 28, 30, 32, 51

General Committee of Adjustment v. M.K.T.R.Co., 320 U.S. 323 (1943) 36, 43

Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974) 35

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 28, 30, 32, 51

Imbler v. Pachtman, 424 U.S. 409 (1976) 32, 51

International Ass'n of Mach. & A. Wkrs. v. National Med.Bd., 425 F.2d 527 (D.C. Cir. 1970) 36

Jerome S. Wagshal v. Charles E. Sheetz, et al., Civil Action No. 90-CA 06155 (Sup.Ct.DC 1990) 4

Kimbrough v. Holiday Inn,, 478 F.Supp. 566 (E.D.Pa. 1979) 39

Malley v. Briggs, 475 U.S. 335 (1985) 3, 37, 42

Mireles v. Waco, __U.S.__, 112 S.Ct. 286 (1991) 32, 35

Mitchell v. Forsyth, 472 U.S. 511 (1985) 29

Parker v. Gladden, 385 U.S. 363 (1966) 17, 31

Rhea v. Massey-Ferguson, Inc., 767 F.2d 266 (6th Cir. 1985) 39

Scheuer v. Rhodes, 416 U.S. 232 (1974) 29, 54

Smith v. Brantley, 400 So.2d 443 (Fla. 1981) 54

State ex rel. Ryan v. Murphy, 30 Nev. 409, 97 P. 391 (1908) 54

Stump v. Sparkman, 435 U.S. 349 (1978)..... 35, 53, 57

Supreme Court of Virginia v. Consumers Union, etc., 446 U.S. 719 (1980) 34

Tower v. Glover, 467 U.S. 914 (1984).. 43, 51

United States v. Wright, 28 Fed.Cas. 792 (C.C.D. Ohio 1839)(No. 16775) 54

Wagshal v. Foster, 28 F.3d 1249 (D.C. Cir. 1994).....1, *passim*

Westfall v. Erwin, 484 U.S. 292 (1988).... 57

Wood V. Strickland, 420 U.S. 308 (1975)... 51

STATUTES AND RULES

28 U.S.C. Sec. 1254(1)..... 1

28 U.S.C. Sec. 1331 24

28 U.S.C. Sec. 1332 24

28 U.S.C. Sec. 1343 24

28 U.S.C. Sec. 1367 24

42 U.S.C. Sec. 1983 24

Rule 11, Fed.R.Civ.P. 20

Rule 12(b), Fed.R.Civ.P. 20

OTHER

United States District Court for the District of New Jersey, Bench Manual for Appointment of Mediator, 136 F.R.D. 499 (D.N.J. 1990)..... 39, 46

Harter, "Neither Cop Nor Collection Agent: Encouraging Administrative Settlements By Ensuring Mediator Confidentiality," 41 *Administrative Law Review* 315 (Summer 1989) 39

Mediation Law, Policy and Practice, Rogers & McEwen (Clark Boardman Callaghan 1989)..... 41

Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The District Of Columbia Circuit

Jerome S. Wagshal respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (**App.** A, *infra*) is reported at 28 F.3d 1249 (D.C.Cir. 1994).

GROUNDS FOR JURISDICTION IN THIS COURT

Petitioner's petition to the Court of Appeals for rehearing was denied on September 16, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The immunity challenged by this case is entirely judge-made.

STATEMENT OF THE CASE

Nature Of The Case

The issue presented by this petition is

whether absolute or qualified judicially-created immunity from civil suit should be accorded to court-appointed mediators, and whether any such immunity should shield mediators from civil suit when they deliberately act beyond their mediating function, and make public recommendations to the court based on knowledge gained during a mediation session.[1] The issue of mediator immunity has never previously been considered by this or any other court prior to this case. The increasing pressures placed on litigating parties to engage in mediation as an alternative to litigation make this an important issue calling for a definitive pronouncement by this Court. Indeed, such pressures sometimes, as in this case, go so far as compulsory participation.

The Court of Appeals held that a mediator conducting a compulsory mediation is ab-

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1. See Foster's statement, particularly sentence [1], quoted at p. 11, *infra*, for Foster's admission that his offending statements were based on knowledge gained from his mediation work.

solutely immune from civil suit even when he[2] elects to go outside the mediation process and assumes the role of an advisor to the court, and an advocate for one side or the other.

As more fully explained below, the function of mediation is uniformly recognized as being inherently one in which the mediator deals with the parties under a solemn commitment of confidentiality and non-disclosure to the court of anything learned in the mediation, and an equally solemn assurance of neutrality--not to take either side in any of the adjudicative aspects of the litigation. The issue presented here is whether the mediator should be granted any form of immunity to violate these fundamental constraints on his role, speaking out voluntarily to the appointing court against one side or the other.

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2. Petitioner uses the masculine pronoun in generalized statements in this petition as a matter of literary convenience, recognizing that such statements properly should be stated as "he or she...."

Statement Of Facts

No textbook hypothetical could create a better factual setting for consideration of the limitations on mediator immunity than what occurred in this case. In summary, a court-appointed mediator who was restricted by the order appointing him from making any substantive report to the appointing court violated that restriction by making adversarial written recommendations to the court. His actions were even more extreme because the mediator's partisan recommendations were made immediately after he resigned his appointment.

Petitioner, the plaintiff below (sometimes herein "plaintiff" or "Wagshal"), was previously a plaintiff in an action in the Superior Court of the District of Columbia charging fraud against one "Sheetz," a real estate property manager.[3] Foster is a

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[3]. *Jerome S. Wagshal v. Charles E. Sheetz, et al.*, Civ. No. 90-CA06155 (Superior Ct. DC, complaint filed June 6, 1990). In addition to Sheetz himself, others allied with him, including his attorney, were named

lawyer in private practice who was appointed by the Superior Court judge in the *Sheetz* case to conduct "neutral case evaluation,"[4] an alternative dispute resolution ("ADR") procedure the stated purpose of which was to give the parties an impartial lawyer's evaluation of each side's case, which would hopefully encourage settlement.

Throughout this case, "neutral case evaluation" has been held to be equivalent to mediation.[5] Petitioner accepts this conclusion of functional equivalence for purposes of analysis,[6] and for ease of expression

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as defendants and participants in the fraud. References to "Sheetz" herein are generally meant to include all the *Sheetz* case defendants.

4. Foster was appointed after a prior appointee had disclosed a conflict of interest and his appointment had been withdrawn on plaintiff's motion.

5. The District Court held that, "For purposes of this case the functions of mediators and evaluators are indistinguishable," **App. B** at 2, n. 2. and the Court of appeals agreed. **App. A** at 2, n. 2.

Foster repeatedly referred to himself as being a "mediator." For example, at the telephone hearing at which he resigned, Foster identified himself as, "Mark Foster, formerly the court-appointed mediator in this case." Other similar examples are quoted in the text, *infra*.

6. The two procedures are identical with respect to the twin obligations of confidentiality and

Foster will henceforth be referred to as a mediator.

The Court *compelled* the parties to participate in this mediation, and stayed all pretrial procedures, including discovery, pending its completion. Wagshal objected to the stay as premature, because he had instituted discovery, which Sheetz had objected to, designed to disclose by how much Wagshal had been defrauded. Thus the stay on discovery precluded Wagshal or Foster, or anyone but Sheetz, from being able to make an informed evaluation of the case. Sheetz of course would not withdraw his objections to the discovery. The Court nevertheless overruled Wagshal's objections to the stay and compelled him to participate in the mediation.

At the first mediation session held by Foster, he disclosed that he and his firm had in the past been repeatedly retained by Home

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neutrality, which are at the center of this case.

Insurance, an insurance company which was then insuring one of the *Sheetz* case defendants. When Wagshal, through his attorney, raised a question about Foster's neutrality as a result of this relationship, Foster demanded that Wagshal state whether he would waive objection to Foster's continuing to serve. Wagshal agreed to do so, requesting only Foster's assurance that he regarded himself as neutral in view of the possibility that Home Insurance might retain Foster or his firm in other matters in the future.

Dissatisfied with this response, Foster resigned. This could have ended his involvement in the case. However, Foster wrote letters to both the presiding judge and the parties containing statements critical of, and clearly prejudicial to, Wagshal, including a thinly veiled accusation that Wagshal was acting in bad faith. When Foster's letters had an obvious, and seriously adverse effect on the court, Wagshal was so clearly disad-

vantaged that he felt compelled to settle his fraud case, despite his wish not to.

Four documents, taken together, provide the factual frame of this litigation. Two of the documents constituted the charter of Foster's appointment, and establish Foster's twin obligations of confidentiality and neutrality. The other two documents are Foster's letters which violated those obligations.

A. The two documents Which Established Foster's Obligations

The order appointing Foster, **App. D**, provided that "the confidentiality of the Evaluation [mediation] be governed by the Statement of Understanding which shall be signed by all parties and counsel," and limited the mediator's consultations with the Court to "matters of timing and procedure...." The "Statement of Understanding," **App. E**, in turn, assured the parties that Foster "will serve as a neutral party," [emphasis in original], that he would "not

act as an...advocate for any party," and, "In no event will a mediator or evaluator voluntarily testify on behalf of a party." Thus, these two documents taken together, establish the two basic principles which were intended to govern Foster's role:

(i) That Foster was required to serve as a neutral party, and could not act as an advocate for either side; and

(ii) That Foster was required to maintain the confidentiality of the evaluation process by not testifying or reporting to the Court. This would clearly include a prohibition against communicating substantive recommendations to the Court.

B. Foster's Two Letters Which Violated His Obligations

When Foster resigned rather than comply with Wagshal's request for an simple assurance of impartiality, he fired off two letters, both written on the letterhead of

Foster's firm.[7] One was to the court ("the Foster court letter," **App. F**), and the other to all counsel in the case ("the Foster counsel letter," **App. G**).

The Foster court letter, **App. F**, informed the Court that after Foster had held a meeting with the parties he had, "received a letter from plaintiff's counsel challenging my neutrality in this matter on account of various connections between this firm [sic] and the Home Insurance Company." Foster reported that he had, "insist[ed] that plaintiff and his counsel either waive any objection or consent to my going forward." [sic, possibly intended for an alternative construction.] Noting that plaintiff's "consent had not been forthcoming,"--a serious distortion since plaintiff had offered to accept Foster's assurance of neutrality--Foster told

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[7]. Foster consistently acted as a member of his law firm. The potential conflict of interest involved his law partnership, and all Foster's actions were clearly done within the scope of his firm's business. This was the basis for naming some of Foster's partners as defendants.

the court that, "I feel that I must recuse myself and recertify this matter to you."

At this point Foster could have ended his letter since, by his choice, he had concluded his involvement in the case. However, Foster then volunteered two paragraphs containing seven blistering statements critical of plaintiff, which are the heart of plaintiff's complaint. Although plaintiff's injury from Foster's statements was averred in his verified complaint and must be accepted as true at this point, since the case was dismissed on motion, *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), a brief explanation of the nature of plaintiff's injury may serve to make the issues clearer. Foster's seven statements are therefore quoted below with a brief comment regarding the injury created by each:

> [1] "Based upon the knowledge that I have obtained in this case up to this point, I strongly urge you to order Mr. Wagshal, as a pre-condition to any further proceedings in his case, to en-

> gage in a good faith attempt at mediation. [sic for "case evaluation"]."

Here, Foster admitted that all his statements were based on the knowledge obtained by his involvement as a mediator in the case, which was supposed to be confidential. This statement is obviously an implied accusation that plaintiff had not previously acted in good faith. His "urging" that plaintiff be required to alter his conduct as a "pre-condition to any further proceedings in his case," impaired plaintiff's constitutional right of access to the courts. This impairment apparently could only be cured by a future breach of the confidentiality of the mediation process, in order to establish plaintiff's changed conduct had exhibited "good faith."

> [2] "In my view, and based upon my experience as a Superior Court mediator [sic], this is a case that can and should be settled if the parties are willing to act reasonably."

Plaintiff had told Foster that he was disinclined to settle until Sheetz was compelled

to respond to discovery which revealed the extent of the fraud. Foster's volunteered recommendation, which was further unsworn testimony, that the case "should be settled" was directly opposed to plaintiff's interests.

> [3] "Even if no settlement is forthcoming, this case can surely benefit from some agreed-upon-phased discovery rather than an unregulated discovery free-for-all."

This emphasis on an agreed discovery program again favored *Sheetz* who would never agree to this disclosure. Foster's unsworn testimony in effect again urged blockage of plaintiff's access to the judicial system.

> [4] "Mr. Wagshal has now challenged two neutral mediators [sic] appointed by this court, in both cases on grounds that can be characterized as attenuated."

Plaintiff's challenge to Foster's predecessor had been approved by the Court before Foster ever became involved in the case, and this gratuitous criticism by Foster, still more unsworn testimony, this time of a matter oc-

curring before Foster's appointment, was calculated to make plaintiff out as a chronic frivolous challenger. This appeared to be Foster's way of retaliating against a question being raised regarding his neutrality.

> [5] It seems to me that Mr. Wagshal ought to be required to fulfil his obligations under the court's rules concerning mediation [sic] before he is allowed to proceed with his suit.

This statement is predicated on non-existent rules, and non-existent obligations. There are no Superior Court rules "concerning mediation" which place "obligations" on litigating parties, other than attendance. The accusation that plaintiff had failed "to fulfil" non-existent "obligations" under non-existent "rules" was clearly calculated to prejudice the plaintiff in the eyes of the Court. Worse yet, the repeated recommendation to delay the case was contrary to plaintiff's interest in prosecuting the fraud of which he had been the victim, before memories dimmed.

> [6] You may also wish to consider who should bear the defendant's costs in participating in two aborted mediations.

In context, this was an clear recommendation to assess monetary penalties against plaintiff, in violation of the neutrality required of Foster.

> [7] I very much regret the time that has now been wasted by my predecessor, Mr. Kaplan, and by all counsel and their clients as a result of this second failure to complete scheduled mediation.

Foster's charge that plaintiff had wasted time a second time by raising a question regarding Foster's neutrality, and his repeated criticism of plaintiff's earlier challenge to his predecessor, was still more unsworn testimony against the plaintiff.

This analysis picks each sentence apart, but the cumulative effect of Foster's statements was far more damaging, the whole being greater than the sum of its parts. No ordinary witness would have been permitted to say such things as testimony at a court hearing.

If Foster had been permitted to make such statements as a witness, he had opened obvious areas of potential cross-examination regarding his bias and prejudice for a perceived slight to his neutrality, as well as his interest in potential future business from Home Insurance. Foster's statements were essentially arguments made by an opposing party.

Contemporaneously with his letter to the Court, Foster sent a letter to all counsel ("the Foster counsel letter"--**App. G**), in which he enclosed a copy of the Foster court letter, **App. F**, and made several additional critical observations about the plaintiff. Speaking of plaintiff's request that Foster state whether he felt he could serve impartially, Foster stated:

> ...Mr. Shaughnessy and his client continue to attempt to straddle the issue by casting on me the burden of a sort of voir dire process. I am not satisfied by this attempt to "conditionally object" to my objectivity so that, if the mediation process

> does not go as he wishes, Mr. Wagshal can attack my impartiality at a future point.

Here was a charge that plaintiff was deceitfully attempting to set Foster up for a future attack, "if the mediation process does not go as he wishes...." Foster was characterizing plaintiff as a devious potential future adversary, not speaking in a neutral fashion about plaintiff as a party to mediation.

It would be blinking reality not to recognize the extreme prejudice inherent in Foster's statements.[8] In significant respects, the Court followed Foster's recommendations, to plaintiff's considerable disadvantage. The Court held that, "this case is not moving forward until some efforts have been made at settlement [or] to develop a discovery plan." More important, the Court continued its refusal to rule on plaintiff's

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8. *Compare Parker v. Gladden,* 385 U.S. 363, 365 (1966)(holding that it would be blinking reality not to recognize the extreme prejudice of a bailiff's statements to jurors regarding an accused's guilt).

pending motions to compel document production. Finally, the Court indicated it would have imposed sanctions on plaintiff but for the fact that Foster had inartfully phrased his ultimatum letter so as to permit plaintiff's silence to constitute a refusal to waive objections.

Plaintiff attempted to mitigate the damage by seeking a protective order against use of Foster's letters in future proceedings, but Sheetz opposed this motion and the Court denied it, so that plaintiff would have had to litigate his fraud charge against Sheetz under the cloud of Foster's charge of plaintiff's bad faith which plaintiff never had an opportunity to refute.

The Court then appointed yet a third mediator, Coleman Hicks, Esq., who disclosed that he, too, had a possible conflict of interest, involving prior relationships with Sheets' attorneys, which might make his neutrality open to question. Plaintiff once

again requested, but this time received and accepted, Hicks' assurance of neutrality. Then plaintiff accepted a settlement for substantially less than sought in the complaint, having never obtained the discovery which would have provided information about the full sum of which he had been defrauded.[9]

Thereafter, this case was filed against Foster.

Course of Proceedings and Disposition In The Courts Below

The complaint against Foster contained eight counts: Count I - Deprivation of Constitutional Rights (1st and 5th amendments); Count II - Defamation (the Foster court letter); Count III - Defamation (the Foster counsel letter); Count IV - Invasion of Privacy (the Foster court letter); Count V - Invasion of Privacy (the Foster counsel letter); Count VI - Breach of Confidential

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9. The facts stated in the preceding paragraphs were taken from the statement in plaintiff's appellate brief, where they were meticulously referenced to the record on appeal.

Relationship; Count VII - Breach of Fiduciary Obligation; and Count VIII - Intentional Infliction of Severe Emotional Distress.

The District Court decided the case in Foster's favor in the most summary fashion. Foster moved to dismiss or for summary judgment, but since Foster's motion was supported by affidavit, his motion was a motion for summary judgment. Rule 12(b), Fed.R.Civ.P. However, the district court granted "defendants' motion to dismiss or for summary judgment...." In short, the Court summarily ruled against plaintiff in every way open to it. *See* **App. B.**[10]

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10. In a final footnote, the District Court "invite[d] the defendants other than Mr. Foster to apply for sanctions pursuant to Fed.R.Civ.P. 11 if they elect to do so." The district court did this based on the holding that it was, "unable to perceive any basis upon which plaintiff might have concluded that Mr. Foster's law firm and his partners, as distinguished from Mr. Foster himself, could be liable to him on the allegations of his complaint." The court, ignored (i) defendants' concession in their summary judgment memorandum that for purposes of the motion they did not contest the allegation that Foster was acting within the scope of his firm's business, and (ii) plaintiff's discovery, which had been stayed, some of the items of which sought evidence to establish that Foster was acting within the scope of his firm's business. Foster's partners

The core of the District Court's decision is found in **App. B**, where the Court stated that although, "court-appointed mediators and their like have not been around long enough to have generated much in the way of precedent with respect to the extent to which they enjoy the immunity of the court whom they serve," nevertheless, "[o]ther more traditional agents of the judicial process have, however, historically been held to posses such immunity when they act in their official capacities...." In a footnote to this statement the Court cited decisions granting absolute immunity, *inter alia*, to court-appointed psychiatrists, prosecutors, and arbitrators acting within the scope of their duties. The Court then concluded that "court-appointed arbitrators, mediators, case evaluators, and others who are directly involved in ADR programs with express authority from the court may properly invoke the same protection." In

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made no Rule 11 application.

other words, the Court twice named arbitrators, once as comparable officials to mediators and the second time in its holding regarding mediators. It is particularly noteworthy that the Court nowhere discussed the specific functions of mediators, as distinguished from arbitrators, in terms of whether mediators make discretionary determinations.

The Court of Appeals adopted the same line of reasoning by analogy in reaching its decision, but its statements were even broader and more confusing than those of the District Court. In the key passages on the central issue, **App. A** at 7-8, the Court correctly stated that plaintiff's argument was that Foster's letter to the Court "breached Foster's obligations of neutrality and confidentiality." The Court appeared to accept this claim arguendo, stating:

> We assume such a breach for purposes of analysis. [**App. A** at 8]

However, the Court did not hold fast to this assumption. After analogizing Foster's ac-

tion to an error made by a judge while acting in a judicial capacity, the Court then held, in a statement that cannot be reconciled with the assumption quoted above, that,

> [W]e have no doubt that Foster's announcing his recusal, reporting in a general way on the past course of mediation, and making suggestions for future mediation were the sort of things that case evaluators would properly do. **App. A**, at 8 [emphasis added].

The Court then rejected Wagshal's argument that Foster had no immunity because he had already resigned as a mediator when he wrote his letters. The Court broadly held that, "we doubt very much if a modest gap in time between effective recusal and recounting of the events would take the latter out of the immunity." Nothing was stated as to when a "modest gap in time" became more than modest, and was operative.

Finally, the Court rejected the contention that Foster's actions were taken in the complete absence of all jurisdiction. In what was in effect a repetition of its prior

holding, the Court concluded that, "Foster was...discharging the duties of case evaluator under color of authority." **App. A** at 9.

The Court of Appeals, like the District Court, failed to consider whether Foster merited only qualified immunity.

BASIS OF JURISDICTION IN THE DISTRICT COURT

The district court's jurisdiction was based on 42 U.S.C. Sec. 1983 and 28 U.S.C. Secs. 1331 and 1343. Supplemental, jurisdiction of the district court was predicated on 28 U.S.C. sec. 1367 and 1332, to hear and decide claims under the law of the District of Columbia.

REASONS FOR ALLOWANCE OF THE WRIT

Introductory Statement

The concept of absolute immunity from civil suit is judge-created, having its roots in common-law principles. And being defined solely by the judiciary, it is particularly appropriate that this Court provide needed

correction when the lower courts improvidently grant or deny it, a point reflected in the many prior decisions by this Court on the general subject of immunity.

However, this case is, as noted above, one of first impression on the issue of whether a court-appointed mediator should be accorded absolute immunity when he deliberately engages in acts which do not involve any mediation function, and which violate the restrictions placed by the court on the scope of his duties. Neither lower court could find any square precedent for conferring absolute immunity on a mediator. Both concluded, petitioner maintains erroneously, that the mediator is so closely allied to the adjudicative function as to merit absolute immunity even for actions by the mediator outside of the mediation room.

The key error by the Court of Appeals which merits review by this Court is its failure properly to apply the principle which

have been mandated by this Court for determining whether to grant judicially-conferred absolute immunity from civil suit, that is, *a functional analysis*. Instead, the court conferred immunity on mediators by an inaccurate analogy to actual participants in the judicial process, when these other participants have far different functions, which merit diametrically different conclusions.

Another factor which argues for review by this Court is the generally acknowledged increasing use of mediation as an ADR procedure. At first blush, this might seem to support the granting of absolute immunity for mediators regardless of what they may do. However, deeper analysis counsels that the success of mediation as an ADR procedure is inherently grounded on the trust of the litigating participants that the mediator will stay within the boundaries of his function--that he will not at some later time use the knowledge gained in the mediation proceedings

to breach his commitments and obligations of confidentiality and neutrality, in short, that he will not take sides in proceedings before the Court.

Unless the lower court decision in this case is reversed, mediators will henceforth have absolute immunity to violate the trust essential to successful mediation and will be free, if the mediation is unsuccessful, to become advocates for one side or the other, as Foster did. The result will be the creation of a major disincentive against wholehearted participation in mediation by litigants. Moreover, if mediators can, with absolute immunity, violate the confidentiality and neutrality limitations on the scope of their duties, contrary to promises made by the judiciary to participating parties, the integrity of the judicial process itself is subverted. Absent correction by this Court, that is now the law in the District of Columbia Circuit, and the only guide to the

other circuits on this subject.

I. THERE IS OBVIOUS UNEQUAL TREATMENT WHERE MEDIATORS ARE GIVEN ABSOLUTE IMMUNITY WHICH IS DENIED TO MORE SENIOR OFFICIALS IN THE OTHER BRANCHES OF GOVERNMENT

In *Forrester v. White*, 484 U.S. 222, 226 (1988), Justice O'Connor articulated the thought that first comes to the mind when the lower court's decision granting absolute immunity to mediators is compared to the broad sweep of this Court's decisions restricting or denying the grant of absolute immunity sought by officials of other branches:

> One can reasonably wonder whether judges, who have been primarily responsible for developing the law of official immunities, are not inevitably more sensitive to the ill effects that vexatious lawsuits can have on the judicial function than they are to similar dangers in other contexts.

It makes for a highly invidious comparison to note that, while the Court of Appeals in this case conferred absolute immunity from civil suit to an attorney in private practice acting as an ad hoc mediator, this Court has

denied absolute immunity, *inter alia*, to senior aides and advisers to the President of the United States, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); state governors and their aides, *Scheuer v. Rhodes*, 416 U.S. 232 (1974); and even cabinet officers, *Mitchell v. Forsyth*, 472 U.S. 511 (1985). It is difficult to define a rationale, much less a public policy, that justifies granting only qualified immunity to such officials, and thus making them liable when they knowingly violate fundamental rules, while granting absolute immunity to mediators even when they likewise deliberately violate fundamental rules.

It should be of particular concern that the lower court failed to consider whether qualified immunity, which is the general standard applied to these other officials, might be sufficient to serve the reasonable needs of mediators. This Court has held that in most cases qualified immunity is suffi-

cient to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority. *Buckley v. Fitzsimmons*, __U.S.__, 113 S.Ct. 2606, 2613 (1993), quoting *Butz v. Economou*, 438 U.S. 478, 506 (1978). In *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), this Court reformulated qualified immunity to establish an objective standard that allows liability only where the official violates clearly established statutory or constitutional rights of which a reasonable person should have known. This Court has held that qualified immunity "provides ample support to all but the plainly incompetent or those who knowingly violate the law."[11]

The lower court apparently did not think that this standard would sufficiently protect Foster as a mediator, and Foster himself ar-

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11. *Malley v. Briggs*, 475 U.S. 335, 341 (1986), quoted with approval in *Burns v. Reed*, __U.S.___, 111 S.Ct. 1934, 1944 (1991).

gued against being shielded only by qualified immunity. He correctly defined his self-interest. Had Foster been accorded only qualified immunity, he would have had to answer for his violation of the basic constitutional prohibition against the trial court's receipt of "outside influence," and his denial of petitioner's right to confront and cross-examine witnesses against him, fundamental requirements of a constitutionally fair judicial proceeding. *Parker v. Gladden*, 385 U.S. 363, 364-65 (1966).

II. REVIEW BY THIS COURT IS NECESSARY TO BRING THE LAW REGARDING MEDIATORS INTO CONFORMITY WITH THE PRINCIPLE OF FUNCTIONAL ANALYSIS WHICH IS THE TOUCHSTONE FOR DECIDING IMMUNITY ISSUES

A. The Principle Of Functional Analysis Must Govern

Over and over again, this Court has instructed the federal judiciary to apply the principle of *functional analysis* in deciding whether to extend the grant of absolute immunity to officials claiming it. *See, e.g.,*

Harlow v. Fitzgerald, supra, 457 U.S. at 812 (1982); *Cleavinger v. Saxner,* 474 U.S. 193 at 201-203 (1985), citing *Briscoe v. LaHue,* 460 U.S. 322, 342 (1983)("[O]ur cases clearly indicate that immunity analysis rests on functional categories, not on the status of the defendant."); *Forrester v. White,* supra, 484 U.S. at 224; *Butz v. Economou, supra,* 438 U.S. at 478; *Mireles v. Waco,* __U.S.__, 112 S.Ct. 286, 288-89 (1991).

B. Whenever This Court Has Granted Absolute Immunity In Connection With Judicial Actions, It Has Premised The Grant On Finding *Adjudicatory* Functions, And Mediators Exercise No Adjudicatory Functions

Whenever this Court has considered claims for absolute "quasi-judicial" immunity, it has always emphasized that such absolute immunity is only granted for a function related to discretionary decision-making in the course of *adjudication.* In *Imbler v. Pachtman,* 424 U.S. 409, 423 n. 20 (1976), this Court held that prosecutors are abso-

lutely immune when "acting within the scope of their duties," and explained with obvious approbation:

> Courts that have extended [absolute judicial] immunity to the prosecutor have sometimes remarked on the fact that all three officials-judge, grand juror, and prosecutor-exercise a discretionary judgment on the basis of evidence presented to them [citations] It is the functional comparability of their judgments to those of the judge that has resulted in both grand jurors and prosecutors being referred to as "quasi-judicial" officers, and their immunities being termed "quasi-judicial" as well. [citations]

Conversely, whenever the factor of discretionary adjudication of disputes or discretionary decisions directly relating to such adjudication has been lacking, absolute immunity has been denied to prosecutors. *Burns v. Reed,* 500 U.S. 478 (1991)(absolute immunity denied for prosecutor's function in giving legal advice to police); *Buckley v. Fitzsimmons, supra* (absolute immunity denied to prosecutor for investigative functions and statements at press conference regarding

pending case).

Consistent with this narrowly drawn basis of absolute immunity, it has even been denied to judges for those actions not directly adjudicative. *Forrester v. White, supra,* 484 U.S. at 229 (immunity denied to judge where, "The [personnel] decisions at issue...were not themselves judicial or adjudicative" even though they were "quite important in providing the necessary conditions of a sound adjudicative system"). *See also, Supreme Court of Virginia v. Consumers Union, etc.,* 446 U.S. 719, 731 (1980)(where issuance of Bar Code, "was not an act of adjudication but one of rulemaking," judicial immunity denied to court, but legislative immunity granted); and *Cleavinger v. Saxner, supra,* 474 U.S. at 203 (prison discipline committee denied absolute immunity because, although, "in a sense, [they] do perform an adjudicatory function in that they determine whether the accused inmate is guilty or innocent of

the charge leveled against him," nevertheless their function was not "a 'classic' adjudicatory one...."). *See also, Ex parte Virginia*, 100 U.S. (10 Otto) 339 (1880), cited with approval in *Forrester v. White*, supra, 484 U.S. at 228, where this Court declined to extend immunity to a county judge who was charged in a criminal indictment with discriminating on the basis of race in selecting trial jurors, this function not being one that need be done by a judge.[12]

Since a mediator's function is inherently not "adjudicative" or "adjudicatory," the conclusion compelled by this long line of authority is that mediators do not merit absolute "quasi-judicial" immunity. Unlike an arbitrator, a mediator by definition is not supposed to make any adjudicative decision.

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12. And *compare Mireles v. Waco*, __U.S.__, 112 S.Ct. 286 (1991)(judge held absolutely immune for ordering absent attorney brought before him with force), with *Gregory v. Thompson*, 500 F.2d 59 (9th Cir. 1974), cited in *Stump v. Sparkman*, 435 U.S. 349, 361 n. 10 (1978)(judge held not engaged in an act of a judicial nature in evicting someone from the courtroom by use of physical force).

Thus, in *General Committee of Adjustment v. M.K.T.R.Co.*, 320 U.S. 323, 337 (1943), this Court held that

> The concept of mediation is the antithesis of justiciability.[13]

This Court went on to distinguish mediation from adjudication by observing that, "When a court has jurisdiction it has of course 'authority to decide the case either way.' [citing case]." *Id.* at 337. *See also, District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), holding that a function is judicial in nature which involves investigation, declaration and enforcement of liabilities as they stand on present or past facts and under existing laws.

This Court has narrowly restricted the functional analysis leading to grants of ab-

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13. Indeed, the District of Columbia Circuit itself relied on this holding regarding the inherent character of mediation in *International Ass'n of Mach. & A. Wkrs. v. National Med.Bd.*, 425 F.2d 527, 538 (1970), but in the case at Bar the Court inexplicably chose to brush this holding aside as having been held "in radically dissimilar contexts," although it is squarely on point. **App. A** at 6.

solute immunity specifically to those classes of persons actually serving in adjudicatory roles within the judicial process. For example, although prosecutors acting within the scope of their prosecutorial functions and witnesses are two classes of persons to whom absolute "quasi-judicial" immunity has been extended, this Court has denied immunity to those who attempt to use analogy to coattail into these classes. *See Malley v. Briggs*, 475 U.S. 335 (1985)(police officer applying to court for search warrant was neither prosecutor nor witness). In *Malley*, this Court held that such a function was subject to qualified immunity and no more, because this would not "impair the judicial process." *Id.* at 342. If a police officer who is, functionally, supposed to appear before the court in an adversarial context as part of the scope of his work, is nevertheless denied absolute immunity, how can absolute immunity be conferred on a mediator who, functionally, is

not supposed to communicate to the court in an adversarial context? Stated differently, how can it "impair the judicial process" to make a mediator subject only to qualified immunity when the mediator is inherently not supposed to be involved in the adjudicative judicial process at all?

The documents circumscribing Foster's duties, **App. D** and **E**, confirm that Foster was denied adjudicative discretion of any kind, including no testimonial or prosecutorial role. These documents contained explicit assurances from the Court to the litigants that Foster would not exercise such adjudicative functions. Indeed, Foster, as a mediator, was the one person in the world most clearly barred from any adjudicative role in the *Sheetz* litigation.

The documents appointing Foster reflect the common understanding of mediation. All the scholarly commentary which Petitioner has found on the subject confirm that neutrality

and confidentiality from the court are inherent in a mediator's function.[14] Here are representative statements:[15]

> [M]any of the putative benefits of mediation can be achieved only if the proceedings are held confidential
> * * *
> ...Confidentiality assures the parties that what is said in the discussions will be limited to the negotiations alone so they can be forthcoming.
> * * *

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14. It is important to distinguish the traditional mediation program in this case--which clearly contemplated that the mediator would not communicate any judgments to the court based on the matters disclosed to him in confidence by the parties--from other kinds of ADR programs in which the appointee is called a "mediator" but in which all parties are informed in advance that the appointee's function involves disclosure of a determination--an evaluation of liability--to the appointing court. *See, e.g., Rhea v. Massey-Ferguson, Inc.*, 767 F.2d 266, 269 (6th Cir. 1985). *See also Kimbrough v. Holiday Inn,*, 478 F.Supp. 566 (E.D.Pa. 1979), where essentially the same program as in *Rhea* was more accurately referred to as "compulsory, nonbinding arbitration" rather than mediation.

For judicial recognition of the distinction between mediators who must observe the restriction of confidentiality and those who are called "mediators," but who *do* report to the court, *see* Bench Manual For Appointment of Mediator, 136 F.R.D. 499, 503 (D.N.J. 1990)("This process [in Michigan] would most accurately be described as a form of arbitration rather than mediation.")

15. Harter, "Neither Cop Nor Collection Agent: Encouraging Administrative Settlements By Ensuring Mediator Confidentiality," 41 *Administrative Law Review* 315, 324-326 (Summer 1989).

> Mediation can only work as designed if the parties have confidence in the mediator's impartiality....
> * * *
> [I]f the mediator were to testify in a subsequent formal proceeding as to what went on during the negotiations the integrity of the entire process could be jeopardized....
> * * *
> [T]he role of mediator is antithetical to that of judge or aribtrator [sic], and forcing the mediator to reveal his or her judgments about the events would greatly harm the ability of the neutral to function as a mediator.

Indeed, because neutrality and confidentiality are inherent characteristics of mediation, at least one commentator who has considered the question of judicial immunity for mediators has suggested that they should be accorded no immunity at all:

> If not protected by an existing statutory or common law immunity, it seems unlikely that the courts will recognize a new common law immunity for mediators. <u>The mediator does not need protection against reprisals for decision-making or testimony and thus does not fit the usual rationale for immunity.</u> Further, mediators closely resemble counselors, lawyers, and other service providers whose primary activities of advising and counseling have not received common law immunity

protection.[16]

In sum, a mediator's traditional attributes inherently fail to square with the adjudicative profile which is necessary for the granting of absolute immunity.

C. Traditional Common-Law Historical Precedent Is A Strong Guide In Making A Functional Analysis, And There Is No Common-Law Precedent For Granting A Mediator Absolute "Quasi-Judicial" Immunity.

A major thread running through this Court's decisions involving claims of absolute immunity is the inquiry as to whether such immunity was traditionally recognized at common law as necessary for the functioning of the judicial process. *See, e.g., Buckley v. Fitzsimmons, supra,* (absolute immunity denied prosecutor for preliminary investigative work or for press conference: "When, as here,...there is no historical tradition of

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16 *Mediation Law, Policy and Practice,* Rogers & McEwen (Clark Boardman Callaghan 1989) at 190 (para. 10.3)(emphasis added, fn. omitted). This of course goes beyond petitioner's position here which is limited to the denial of absolute immunity to mediators who go beyond their mediating functions.

immunity on which we can draw, our inquiry is at an end."); *Antoine v. Byers & Anderson, Inc.*, __U.S.__, 113 S.Ct. 2167, 2170-71 (1993)(court reporters denied absolute immunity; court finds no common-law tradition involving court reporters themselves and rejects analogy to judges making handwritten notes); *Burns v. Reed, supra,* (prosecutor granted absolute immunity for appearing in court and presenting evidence in support of motion for search warrant, but denied absolute immunity for giving legal advice to police because, "neither respondent nor the court below has identified any historical or common-law support for extending absolute immunity to such actions by prosecutors."); *Malley v. Briggs, supra,* 475 U.S. at 339-340 ("Our initial inquiry is whether an official claiming immunity under Sec. 1983 can point to a common law counterpart to the privilege he asserts."); *Cleavinger v. Saxner, supra,* 474 U.S. at 203 ("We do not perceive the dis-

cipline committee's function as a 'classic' adjudicatory one...."); *Tower v. Glover*, 467 U.S. 914, 921 (1984)(immunity denied to public defenders, who had no such immunity at common law because they did not exist, and English barristers, to whom they may be compared, have no absolute immunity). This Court has made it clear that even where discretion in making adjudicative-type decisions exists, that alone is not a sufficient criterion for the grant of absolute immunity where such decision making is not a traditional part of the judicial process. *Cleavinger v. Saxner, supra*.

Mediation also is not a traditional part of the judicial process. Although mediation is by no means a recent development in the resolution of disputes,[17] no court or party in this case has identified any authority in

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17. Note again, *e.g., General Committee of Adjustment v. M.K.T.R.Co.*, text at n. 13, *supra*, a 1943 decision which establishes that mediation is a function known for over a half century in the Federal system. Historical research will doubtless establish that it goes much further back than this.

the traditional common law which equates a mediator with a judge, or a mediation with an adjudication. This lack of historical precedent again points to the conclusion that the lower court put mediators on the wrong side of the fence dividing those individuals who are entitled to absolute immunity from those have some connection to the judicial process but are not so entitled.

If analogy is the key, then how, on the one hand, can a mediator be accorded absolute immunity to make public statements about a case in which he is involved when there is no common law tradition to support his immunity to do so and, by court order, he is not supposed to do so, and yet, on the other hand, the prosecutor in *Buckley v. Fitzsimmons, supra,* is denied absolute immunity when making public statements about a pending case because, *inter alia,* no such function was recognized at common law, even though he is fully entitled to speak?

D. The Court of Appeals Misapplied The Principle of Functional Analysis In Granting Mediators Absolute Immunity

The Court of Appeals extended absolute immunity to mediators such as Foster by several semantic formulations which failed to employ the true functional analysis mandated by this Court.

For example, in a series of circular *ipse dixits* which subsume the decision in the predicate, the Court noted that "intensive involvement in settlement" is common among trial judges, and that a mediator's efforts are therefore not "purely administrative," but rather are "integrally related to adjudication proper...." **App. A** at 6. Whatever the accuracy of the assertion regarding the present-day involvement of trial judges in mediation efforts, the Court ignored the fact that it would be patently improper for a judge conducting a full-scale settlement mediation, including coaxing candid statements from the parties on the twin assurances of

neutrality and confidentiality, thereafter to act as the trial judge during litigation in the event there was no settlement.[18] These functions of mediation and adjudication become antithetical if fully performed by the same person.

The lower court also held that the comments in Foster's letter "were the sort of things that case evaluators would properly do." **App. A** at 8. This is flat out wrong. This *ipse dixit* alone is so far off the mark that, without more, it justifies the granting of certiorari to protect the fundamental concept of mediation from subversion.

The lower court's conclusion that mediation "seems likely to inspire efforts by disappointed litigants to recoup their losses, or at any rate harass the mediator," **App. A**

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18. *See, e.g.*, United States District Court for the District of New Jersey, Bench Manual for Appointment of Mediator, 136 F.R.D. 499, 509:

> ...If the mediation is not successful, the mediator should refer the case back to the judge <u>without comment.</u> (emphasis added).

at 7, is rank speculation made as a ceremonial bow at one of the standards of functional analysis, and cannot withstand attention to the facts. As noted above, mediation has been a presence in the Federal system for over a half century, and doubtless has been no less present in the judicial systems of the states. (*See* notes 13 and 17, *supra*.) This is ample time for a practical test, and there is no record of a flood of complaints against mediators filling court dockets. *Compare, Cleavinger v. Saxner, supra,* where this Court denied absolute immunity to a prison discipline committee. Although this Court was well aware of the real potential threat of a multitude of prisoner cases,[19] it answered that, "We are likewise not impressed with the argument that anything less than absolute immunity will result in a flood of litigation and in substantial procedural bur-

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19. "The number of nonmeritorious prisoners' cases that come to this Court's notice is evidence of this." 474 U.S. at 203.

dens and expense for committee members. This argument has been made before." 474 U.S. at 207. The Court of Appeals expression of concern about a flood of litigation against mediators, with nothing in practical history to support it, deserves no greater credence.

Finally, in what was its most serious fallacy, the Court of Appeals held that even if Foster's actions did breach his obligations of confidentiality and neutrality, Foster, as a mediator, was nevertheless entitled to immunity by the same logic that preserves immunity for a judge who commits an error by acting in excess of his authority. **App. A** at 8. Applying this reasoning to persons other than judges cuts the substantive heart out of functional analysis test. For example, had such an argument been applied to prosecutors--and if their actions in investigating crimes, in advising police officers, and in holding press conferences had been called errors committed in excess of

their authority, then *Buckley v. Fitzsimmons, supra,* and *Burns v. Reed, supra,* which held such actions by prosecutors not to be covered by absolute immunity, would have been decided the other way.

When Foster sent his letters out, this was not merely an error committed in excess of his authority, but a tidal change of role from that of mediator to unsworn witness, unappointed critic, and general officious intermeddler. It is a fallacy worthy of this Court's review to characterize Foster's actions in sending out his letters as merely the possibly erroneous actions of a mediator.

This point leads to the observation that this case presents an opportunity for clarification of prior holdings by this Court regarding the setting of the outer limits of absolute immunity for those other than judges who may have it.

III. THIS CASE PROVIDES A PRECISE OPPORTUNITY FOR THIS COURT TO CLARIFY THE END POINT OF A GRANT OF IMMUNITY, THAT IS, WHEN, BY FUNCTIONAL ANALYSIS, Even ABSOLUTE IMMUNITY IS LOST

This case provides an unusually precise opportunity for this Court to clarify somewhat ambiguous past pronouncements regarding the proper application of a functional analysis to the issue of the endpoint of a grant of immunity. As the preceding discussion makes obvious, petitioner maintains that the greatest coverage to which a mediator would be entitled under established principles is qualified immunity. However, even were this Court to grant mediators absolute immunity, an issue would remain which merits this Court's review, namely, when would such a grant expire? This issue arises in two ways, that is, when does an official who has absolute "quasi-judicial" immunity lose that immunity by acting "outside the scope" of his function; and, second, when does the immunized official lose immunity by resigning his assignment?

A. Clarification Is Needed Of Past Decisions By This Court Regarding The Consequences When An Official Acts "Outside The Scope" Of His Duties.

This Court has spoken of a "scope of duty" limitation on grants of immunity in two somewhat confusing but obviously related contexts, that is, in connection with the grant of absolute immunity and in connection with the grant of qualified immunity. Qualified immunity is clearly subject to the "scope of discretion and responsibilities of the office..." in question. *Scheuer v. Rhodes, supra,* 416 U.S. at 247. And see *Harlow v. Fitzgerald, supra,* 457 U.S. at 815, adopting the language of *Wood V. Strickland,* 420 U.S. 308, 322 (1975), in referring to the official's "sphere of official responsibility...."

However the same standard has been expressed in connection with absolute immunity. In *Imbler v. Pachtman, supra,* 424 U.S. at 422-23, this Court adopted the common-law rule granting immunity to prosecutors and

grand jurors "acting within the scope of their duties." [Fn. omitted] Unless the lower court's conclusion is accepted that a mediator's making an adversarial report to the appointing court comes within "the sort of things that [mediators] would properly do," petitioner maintains that Foster exceeded the scope of his duties even if he is deemed to have absolute "quasi-judicial" immunity while performing his mediating duties.

However, this conclusion leaves unanswered the question of whether the "scope of duties" concept has different meanings and/or applications to absolute, as distinguished from qualified immunity.

In the case of absolute immunity, does the "scope of duties" concept serve as the equivalent of the concept of "acting in the complete absence of all jurisdiction" when applied to persons other than judges? Does the "scope of duties" concept embody a wider "scope" when applied to absolute immunity

contexts than when applied to qualified immunity contexts?[20] These questions have not been answered by past immunity decisions and their answer would provide valuable and necessary guidance.

B. Clarification Is Needed As To When Immunity Ceases After The Immunized Official Leaves Office.

The lower court brushed aside as "frivolous" petitioner's argument that Foster's letters were written after Foster had left office. However, the Court not only regarded as "doubtful" whether Foster's letters "alone effected a recusal" without judicial permission, but also stated that "we doubt very much if a modest gap in time between effective recusal and recounting of the events would take the latter out of the immunity." **App. A** at 8.

These doubts expressed by the lower

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20. Although the concept of jurisdiction is construed broadly where the issue is the immunity of the judge, *Stump v. Sparkman*, 435 U.S. 349, 356 (1978), petitioner has found no similar expression of liberality in construing the concept of "scope of duties" in the case of judicial aides.

court reflect the unsettled state of the law on a key issue raised by petitioner, which should at least serve to take petitioner's position out of the "frivolous" column. With respect to the effectiveness of Foster's letters as effecting his resignation,[21] the Court chose to ignore a line of authority going back to early times in this country which holds the "American rule" to be that a public official may resign his office at any time without permission from anyone.[22]

More important, the Court's "modest gap" doctrine is potentially the source of great mischief unless it is reversed or at least explained. With no hint from the Court as to

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21. Foster used the word "recuse," which is generally applicable to members of the judiciary, and although this terminology was adopted by the lower court, petitioner maintains that since Foster was not a judge or even a "quasi" judge, "resignation" is the proper term.

22. *United States v. Wright*, 28 Fed.Cas. 792, 793 (C.C.D. Ohio 1839)(No. 16775). *See also, Smith v. Brantley*, 400 So.2d 443 (Fla. 1981); and *State ex rel. Ryan v. Murphy*, 30 Nev. 409, 424, 97 P. 391, 394 (1908).

the hiatus it envisioned by its terminology, one man's "modest gap" may be another's laches. Therefore, as things stand now with the lower court's decision, a party who in good faith agrees to participate in a mediation not only must risk having his case clouded and his name tarnished by adversarial recommendations from the mediator while the mediation is in progress, but must also face the risk that, long after the mediation is concluded unsuccessfully, and after passage of a "modest gap in time," the party may be the target of the mediator's attacks and adversarial recommendations during the ensuing litigation proceedings. Petitioner maintains that such a risk is an unconstitutional burden on a party to litigation, and that it violates due process. This potential risk to litigants should be removed by this Court.

IV. REVIEW BY THIS COURT IS CALLED FOR BY IMPORTANT PUBLIC POLICY CONSIDERATIONS

The Court of Appeals in this case did

just what Justice O'Connor suggested in *Forrester v. White, supra,* by protecting the judiciary's own. In doing so, however, it ignored the principle that absolute immunity is of a "rare and exceptional character," and is granted, "only when public policy requires it." *Cleavinger v. Saxner,* supra, 474 U.S. at 202.

Moreover, this Court has emphasized that the judiciary does not have a license to establish immunities in Sec. 1983 actions solely in the interests of what judges believe to be sound public policy. *Buckley v. Fitzsimmons, supra,* 113 S.Ct. at 2613 and 2618, quoting *Tower v. Glover,* supra, 467 U.S. at 922-23. The conclusion is difficult to avoid that the Court of Appeals did just that in this case, and with negative effects on sound public policy.

This Court has reminded itself not to lose sight of the purpose of the immunity doctrine, which is to promote effective gov-

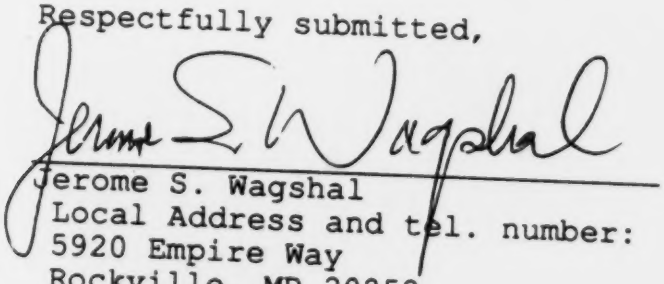
ernment, *Westfall v. Erwin,* 484 U.S. 292, 296-300 (1988), and in this setting that means encouraging participants in the judicial process to be free to act on their convictions. *Stump v. Sparkman, supra,* 435 U.S. at 355. But what beneficent public policy is served by giving mediators, regardless of their convictions, freedom to violate their obligations of neutrality and confidentiality when they wish to do so? Not only will the Court of Appeals' decision tend to impair the sound functioning of any mediation program, but, more seriously, it clouds the integrity of the courts as trustworthy bodies.

On the other side of the scale, it must be remembered that, "absolute immunity contravenes the basic tenet that individuals be held accountable for their wrongful conduct." *Westfall v. Erwin, supra,* at 295. An exception to the fundamental principle of legal accountability is not merited here, and should be reversed.

CONCLUSION

This Court should issue its writ of certiorari to review the lower court's decision, because that decision has resolved an important question of law in a way that conflicts with applicable decisions of this Court and is likely to adversely affect the administration of justice wherever it is followed.

Respectfully submitted,



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FILED

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No. OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

Jerome S. Wagshal,

Petitioner,

v.

Mark W. Foster, et al.

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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December 14, 1994 (Revised)

APPENDICES

APPENDIX A (Opinion of the Court of Appeals)..... ..... A-1

APPENDIX B (Opinion of the District Court) B-1

APPENDIX C (Order denying Rehearing..... C-1

APPENDIX D (Order appointing Foster) ... D-1

APPENDIX E (Statement of Understanding.. E-1

APPENDIX F (Foster letter to the Court). F-1

Appendix G (Foster letter to counsel)... G-1

APPENDIX A

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued May 12, 1994 Decided July 15, 1994

No. 93–5063

JEROME S. WAGSHAL,
APPELLANT

v.

MARK W. FOSTER, ET AL.,
APPELLEES

Appeal from the United States District Court for the District of Columbia
(92cv02072)

Jerome S. Wagshal argued the cause and filed the briefs pro se.

Charles B. Wayne argued the cause for appellees. With him on the brief were *Charles R. Donnenfeld* and *Jeffery A. Tomasevich*.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before: SILBERMAN, WILLIAMS and RANDOLPH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WILLIAMS.

WILLIAMS, *Circuit Judge*: This case presents the issue of whether a court-appointed mediator or neutral case evaluator, performing tasks within the scope of his official duties, is entitled to absolute immunity from damages in a suit brought by a disappointed litigant. The district court found such immunity and we agree.

* * *

In June 1990, appellant Jerome S. Wagshal filed suit in D.C. Superior Court against Charles E. Sheetz, the manager of real property owned by Wagshal. In October 1991 the assigned judge, Judge Richard A. Levie, referred the case to alternative dispute resolution pursuant to Superior Court Civil Rule 16[1] and the Superior Court's alternative dispute resolution ("ADR") program. While the program does not bind the parties (except when they agree to binding arbitration), participation is mandatory. See Superior Court Rules of Civil Procedure 16(j).

Judge Levie chose "neutral case evaluation" from among the available ADR options, and appointed Mark W. Foster as case evaluator.[2] Pursuant to the order of appointment, the parties signed a "statement of understanding" providing

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[1] Superior Court Rule 16(b) provides in part: "At [the initial scheduling and settlement] conference the judge will ... explore the possibilities for early resolution through settlement or alternative dispute resolution techniques...."

[2] We use the terms "case evaluator" and "mediator" interchangeably in this opinion. Each acts as a neutral third party assisting the parties to a dispute in exploring the possibility of settlement, the principal difference being that implicit in the name: the case evaluator focuses on helping the parties assess their cases, while the mediator acts more directly to explore settlement possibilities. See Melinda Ostermeyer, Alternative Dispute Resolution Programs 6 (Superior Court of the District of Columbia, Multi-Door Dispute Resolution Division 1992).

(among other things) that the proceedings would be confidential and privileged, and that the evaluator would serve as a "neutral party". Moreover, the parties were not allowed to subpoena the evaluator or any documents submitted in the course of evaluation, and "[i]n no event [could the] mediator or evaluator voluntarily testify on behalf of a party." Wagshal signed in January 1992 (under protest, he alleges).

After Foster held his first session with the parties, Wagshal questioned his neutrality. Foster then asked that Wagshal either waive his objection or pursue it; if Wagshal made no response waiving the objection, Foster would treat it as a definite objection. Receiving no response by the deadline set, and later receiving a communication that he regarded as equivocal, Foster wrote to Judge Levie in February 1992, with copies to counsel, recusing himself. The letter also reported to the judge on his efforts in the case and recommended continuation of ADR proceedings. In particular, Foster said that the case was one "that can and should be settled if the parties are willing to act reasonably", and urged the court to order Wagshal, "as a pre-condition to any further proceedings in his case, to engage in a good faith attempt at mediation." He also urged Judge Levie to "consider who should bear the defendant's costs in participating" in the mediation to date.

Judge Levie then conducted a telephone conference call hearing in which he excused Foster. Wagshal's counsel voiced the claim that underlies this suit—that he thought Foster's withdrawal letter "indicates that he had certain feelings about the case. Now, I'm not familiar with the mediation process but as I understood, the mediator is not supposed to say, give his opinion as to where the merits are." On that subject, Judge Levie said, "I don't know what his opinions are and I'm not going to ask him because that's part of the confidentiality of the process." Neither Wagshal nor his counsel made any objection or motion for Judge Levie's own recusal.

Judge Levie soon after appointed another case evaluator, and Wagshal and the other parties settled the *Sheetz* case in June 1992. In September 1992, however, Wagshal sued Foster and sixteen others (whom he identified as members of Foster's law firm) in federal district court, claiming that Foster's behavior as mediator had violated his rights to due process and to a jury trial under the Fifth and Seventh Amendments, and seeking injunctive relief and damages under 42 U.S.C. § 1983. Besides the federal claims, he threw in a variety of local law theories such as defamation, invasion of privacy, and intentional infliction of emotional distress. His theory is that Foster's conduct as case evaluator forced him to settle the case against his will, resulting in a far lower recovery than if he had pursued the claim.

The district court granted the defendants' motion to dismiss with prejudice, holding that Foster, like judges, was shielded by absolute immunity. We affirm.

* * *

We may quickly dispatch Wagshal's claim to injunctive relief. While such a claim is not barred by judicial immunity, *Pulliam v. Allen*, 466 U.S. 522, 528–43 (1984), Wagshal lacks standing to seek such an injunction on behalf of others, see, e.g., *Los Angeles v. Lyons*, 461 U.S. 95, 108–09 (1983), and has alleged no likelihood whatever that he himself will again suffer the alleged injury, *id.* at 105–10.

Foster's first line of defense against the damages claim was the assertion of quasi-judicial immunity. The immunity will block the suit if it extends to case evaluators and mediators, so long as Foster's alleged actions were taken within the scope of his duties as a case evaluator.

Courts have extended absolute immunity to a wide range of persons playing a role in the judicial process. These have included prosecutors, *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976); law clerks, *Sindram v. Suda*, 986 F.2d 1459, 1460 (D.C. Cir. 1993); probation officers, *Turner v. Barry*, 856 F.2d 1539, 1541 (D.C. Cir. 1988); a court-appointed committee monitoring the unauthorized practice of law, *Simons v. Bellinger*, 643 F.2d 774, 779–82 (D.C. Cir. 1980); a psychia-

trist who interviewed a criminal defendant to assist a trial judge, *Schinner v. Strathmann*, 711 F. Supp. 1143 (D.D.C. 1989); persons performing binding arbitration, *Austern v. Chicago Bd. Options Exch., Inc.*, 898 F.2d 882, 886 (2d Cir. 1990); and a psychologist performing dispute resolution services in connection with a lawsuit over custody and visitation rights, *Howard v. Drapkin*, 271 Cal. Rptr. 893, 905 (Ct. App. 1990). On the other hand, the Supreme Court has rejected absolute immunity for judges acting in an administrative capacity, *Forrester v. White*, 484 U.S. 219, 229 (1988), court reporters charged with creating a verbatim transcript of trial proceedings, *Antoine v. Byers & Anderson, Inc.*, 113 S. Ct. 2167 (1993), and prosecutors in relation to legal advice they may give state police, *Burns v. Reed*, 500 U.S. 478 (1991). The official claiming the immunity "bears the burden of showing that such immunity is justified for the function in question." *Antoine*, 113 S. Ct. at 2169–70 n.4 (citing *Burns v. Reed*, 500 U.S. at 486).

We have distilled the Supreme Court's approach to quasi-judicial immunity into a consideration of three main factors: (1) whether the functions of the official in question are comparable to those of a judge; (2) whether the nature of the controversy is intense enough that future harassment or intimidation by litigants is a realistic prospect; and (3) whether the system contains safeguards which are adequate to justify dispensing with private damage suits to control unconstitutional conduct. *Simons v. Bellinger*, 643 F.2d at 778 (citing *Butz v. Economou*, 438 U.S. 478, 512 (1978)).

In certain respects it seems plain that a case evaluator in the Superior Court's system performs judicial functions. Foster's assigned tasks included identifying factual and legal issues, scheduling discovery and motions with the parties, and coordinating settlement efforts. These obviously involve substantial discretion, a key feature of the tasks sheltered by judicial immunity and the one whose absence was fatal to the court reporter's assertion of immunity in *Antoine*. See 113 S. Ct. at 2170–71. Further, viewed as mental activities, the tasks appear precisely the same as those judges perform

going about the business of adjudication and case management.

Wagshal protests, however, that mediation is altogether different from authoritative adjudication, citing observations to that effect in radically dissimilar contexts. See, e.g., *General Comm. of Adjustment v. Missouri–Kan.–Tex. R.*, 320 U.S. 323, 337 (1943) ("The concept of mediation is the antithesis of justiciability."). However true his point may be as an abstract matter, the general process of encouraging settlement is a natural, almost inevitable, concomitant of adjudication. Rule 16 of the Federal Rules of Civil Procedure, for example, institutionalizes the relation, designating as subjects for pre-trial conferences a series of issues that appear to encompass all the tasks of a case evaluator in the Superior Court system: "formulation and simplification of the issues", "the possibility of obtaining admissions of fact and of documents", "the control and scheduling of discovery", and a catch-all, "such other matters as facilitate the just, speedy, and inexpensive disposition of the action." Fed. R. Civ. P. 16(c). Wagshal points to nothing in Foster's role that a Superior Court judge might not have performed under Superior Court Rule 16(c), which substantially tracks the federal model. Although practice appears to vary widely, and some variations raise very serious issues, see, e.g., *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648 (7th Cir. 1989) (en banc), it is quite apparent that intensive involvement in settlement is now by no means uncommon among federal district judges. See, e.g., Robert J. Keenan, *Rule 16 and Pretrial Conferences: Have We Forgotten the Most Important Ingredient?*, 63 S. Cal. L. Rev. 1449 (1990); Symposium, *The Role of the Judge in the Settlement Process*, 75 F.R.D. 203 (1976).

Wagshal does not assert that a case evaluator is performing a purely administrative task, such as the personnel decisions—demotion and discharge of a probation officer—at issue in *Forrester v. White*. Because the sort of pre-trial tasks performed by a case evaluator are so integrally related to adjudication proper, we do not think that their somewhat managerial character renders them administrative for these purposes.

Conduct of pre-trial case evaluation and mediation also seems likely to inspire efforts by disappointed litigants to recoup their losses, or at any rate harass the mediator, in a second forum. Cf. *Butz v. Economou*, 438 U.S. at 512 ("The loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus."). Although a mediator or case evaluator makes no final adjudication, he must often be the bearer of unpleasant news—that a claim or defense may be far weaker than the party supposed. Especially as the losing party will be blocked by judicial immunity from suing the judge, there may be great temptation to sue the messenger whose words foreshadowed the final loss. Cf. *Sindram v. Suda*, 986 F.2d at 1461 (noting that loser may turn on clerks because unable to reach the judge).

The third of the Supreme Court's criteria, the existence of adequate safeguards to control unconstitutional conduct where absolute immunity is granted, is also present. Here, Wagshal was free to seek relief from any misconduct by Foster by applying to Judge Levie. Alternatively, if he thought Foster's communications might prejudice Judge Levie, he could have sought Levie's recusal under Superior Court R. Civ. P. 63–I, Bias or Prejudice of a Judge. The avenues of relief institutionalized in the ADR program and its judicial context provide adequate safeguards.

Wagshal claims that even if mediators may be generally entitled to absolute immunity, Foster may not invoke the immunity because his action was not taken in a judicial capacity, see *Mireles*, 112 S. Ct. at 288 (citing *Forrester*, 484 U.S. at 227–29; *Stump*, 435 U.S. at 360), and because he acted in complete absence of jurisdiction, see *id.* (citing *Stump*, 435 U.S. at 356–57; *Bradley*, 13 Wall. at 351). Neither exception applies.

Wagshal's argument that the acts for which he has sued Foster are not judicial (apart from the claim against mediators generally) rests simply on his claim that Foster's letter to Judge Levie, stating that he felt he "must recuse" himself and giving his thoughts on possible further mediation efforts

and allocation of costs, breached Foster's obligations of neutrality and confidentiality. We assume such a breach for purposes of analysis. But "if judicial immunity means anything, it means that a judge 'will not be deprived of immunity because the action he took was in error . . . or was in excess of his authority.' " *Mireles*, 112 S. Ct. at 288 (quoting *Stump*, 435 U.S. at 356). Accordingly we look to the particular act's relation to a general function normally performed by a judge". *Mireles*, 112 S. Ct. at 288–89. Applying the same principle to case evaluators, we have no doubt that Foster's announcing his recusal, reporting in a general way on the past course of mediation, and making suggestions for future mediation were the sort of things that case evaluators would properly do.

Wagshal finally argues that Foster cannot be immune for the statements in his letter made after he stated that he "must recuse" himself. This is frivolous. Even if the letter alone effected a recusal (which is doubtful—Judge Levie clearly saw himself as later excusing Foster from service), the simultaneous delivery of an account of his work was the type of act a case evaluator could properly perform on the way out. In fact, we doubt very much if a modest gap in time between effective recusal and recounting of the events would take the latter out of the immunity.

Nor were Foster's actions "taken in the complete absence of all jurisdiction." Wagshal's claim to the contrary rests primarily on the theory that, although Superior Court Rule of Civil Procedure 16(j) requires parties to "attend . . . any alternative dispute resolution session ordered by the court", there is no explicit authority to *appoint* case evaluators. This contrasts, says Wagshal, with explicit District law authorizing appointment of masters and hearing commissioners. See, Superior Court R. Civ. P. 53(a) & (b) (masters); D.C. Code § 11–1732(a) (hearing commissioners).

Whatever merit this claim may have under District law, it does not come within a country mile of showing complete absence of jurisdiction. For such a showing, the judicial officer must "know[ ] that he lacks jurisdiction, or act[ ]

despite a clearly valid statute or case law expressly depriving him of jurisdiction." *Mills v. Killebrew*, 765 F.2d 69, 71 (6th Cir. 1985) (citing *Rankin v. Howard*, 633 F.2d 844, 849 (9th Cir. 1980)). Similarly, in *White by Swafford v. Gerbitz*, 892 F.2d 457, 462 (6th Cir. 1989), the court held that a judge enjoyed judicial immunity when, despite procedural defects in his appointment, he "possessed the office of Special City Judge and was discharging the duties of that position under color of authority." Foster was similarly discharging the duties of case evaluator under color of authority.

At no point does Wagshal develop his constitutional attacks on Foster's jurisdiction, which evidently rest on the theory that the District's use of case evaluators for mandatory but non-binding dispute resolution violates the due process clause of the Fifth Amendment and the right to jury trial guaranteed by the Seventh Amendment. We do not normally pass upon claims that a party fails to articulate intelligibly. *Int'l Brotherhood of Teamsters v. Pena*, 17 F.3d 1478, 1487 (D.C. Cir. 1994).

* * *

We hold that absolute quasi-judicial immunity extends to mediators and case evaluators in the Superior Court's ADR process, and that Foster's actions were taken within the scope of his official duties. The judgment of the district court is

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JEROME S. WAGSHAL,

Plaintiff, Civil Action No. 92-2072 (TPJ)

v.

MARK W. FOSTER, et al., FILED FEB 5 - 1993

Defendants.

MEMORANDUM AND ORDER

This federal civil action against a state-court-appointed mediator and his law partners, brought by a litigant who believes himself to have been wronged by the mediator in the course of court-ordered "alternative dispute resolution" ("ADR") proceedings, is presently before the Court on defendants' motion, in advance of answer, to dismiss or for summary judgment on the ground of judicial immunity. The record presently before the Court is sufficient for the disposition hereinafter made of defendants' motion, and although the Court has stayed all discovery pending a ruling upon the motion,

it is satisfied that no material facts could be shown to alter the conclusion dictated by those set forth below.[1]

I.

In June, 1990, Jerome Wagshal brought suit in the Superior Court of the District of Columbia against the manager of real property owned by Wagshal ("the Sheetz case"). In October, 1991,the Honorable Richard A. Levie, the Superior Court judge to whom the case had been assigned, ordered a stay of discovery pending efforts to bring the case to settlement through the Superior Court's ADR program, and referred the case, over Wagshal's objection, to a "case evaluator." In the Superior Court APR is mandatory.[2]

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[1] At the moment only plaintiff has initiated discovery. If defendants possess the immunity they claim, however, the immunity alone should relieve them of the obligation to respond.

[2] The alternative dispute resolution program of the Superior Court is a formal division of the court established by order of its Chief Judge, known as the "Multi-Door Dispute Resolution Division," and offers mediation, arbitration, and case evaluation processes to

Wagshal then objected to the first case evaluator appointed as having a "conflict of interest," and Judge Levie accordingly appointed the defendant Mark W. Foster, Esquire, as a substitute on November 21, 1991. The appointing order provided that the evaluation was to be governed by a "statement of understanding" as to "confidentiality," to be signed by the parties, by which the parties acknowledged that the evaluator was a "neutral;" that the proceedings were deemed to be "privileged," and were "not [to] be disclosed in any subsequent proceeding;" that the parties were not to subpoena the evaluator or any documents submitted to him; and that the evaluator would not "voluntarily

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litigants in lieu of trial and judgment. "Case evaluators" for cases such as the Sheetz case are members of the District of Columbia Bar, with at least five years of relevant litigation experience, who volunteer to serve without compensation, undergo required training, and are approved as such by the court.
For purposes of this case the functions of mediators and evaluators are indistinguishable.

testify on behalf of a party." Wagshal signed under protest on January 30, 1992.

Wagshal's counsel then interposed an objection to Mr. Foster as an evaluator, questioning Foster's neutrality once again on the basis of a perceived "conflict of interest," and, when Wagshal refused Foster's express request that Wagshal either waive the objection or make an issue of it before proceeding with evaluation, on February 19, 1992, Foster wrote to Judge Levie to recuse himself as an evaluator. The alleged "conflicts of interest" asserted by Wagshal as to both himself and his predecessor, Foster said, were in his opinion "attenuated," although sufficient to warrant appointing yet another evaluator if it presented an obstacle to the process. In his opinion, however, Foster thought the Sheetz case could and should be settled. He suggested that the court remonstrate with Mr. Wagshal as to his obligations under the

court's rules concerning mediation, implying that Wagshal's attitude represented the principal impediment to the success of the process. Foster offered to transfer his files to a successor on short notice, and to be of any assistance he could to the court otherwise.

In a telephone conference call hearing on February 20, 1992, Judge Levie agreed with Mr. Foster's observations that the alleged conflicts of interest were "attenuated" -- indeed, would have been of no consequence to him had he been asked for a ruling -- but he acceded to Mr. Foster's recusal and excused him from further participation in the conference. Judge Levie then reiterated his determination to maintain the stay of discovery in place and to try once more with case evaluation.

This Court is advised that a third evaluator was appointed, and the Sheets case eventually settled.

II.

On September 10, 1992, Wagshal, pro se, filed this 28-page, nine-count complaint in the U.S. District Court for the District of Columbia against Mark W. Foster, and 16 of his partners in his Washington, D.C. law firm of Zuckerman, Spaeder, Goldstein, Taylor & Kolker. Wagshal prays for compensatory damages of $1 million, and punitive damages of $500,000, "jointly and severally," and an injunction prohibiting Foster from committing "violations of litigants' rights" in the future.[3] The gravamen of Wagshal's complaint is that Foster, as a court-appointed evaluator, so comported himself as to reflect unfavorably upon the merits of Wagshal's claims in the Sheets case, making known his opinion to others, including Judge Levie, to such an extent that the ultimate resolution

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[3]. Wagshal charges Foster with deprivation of his constitutional rights; defamation; invasion of privacy; breaches of confidential and fiduciary obligations; tortious interference with civil litigation; and intentional infliction of emotional distress.

of the Sheets case was less to his satisfaction than Wagshal thought it ought to have been.

Institutionalized, court-sponsored "alternative dispute resolution" of civil lawsuits has evolved of late to relieve court congestion and to expedite the disposition of civil litigation without the full panoply of judicial process and the inordinate expense it entails. It is of relatively recent origin, although more courts are employing it across the country as time passes, and with encouraging results. In its most common form it employs private members of the bar, recruited, trained, and serving, pro bono publico, under the aegis, and as officers, of the court, who assist the parties to legal disputes to find sufficient common ground to form the basis of a settlement.

A review of the case law, however, reveals that court-appointed mediators and their like have not been around long enough

to have generated much in the way of precedent with respect to the extent to which they enjoy the immunity of the court whom they serve when they venture into a private controversy represented by a pending case, and in the course thereof, antagonize one or more of the parties. Other, more traditional agents of the judicial process have, however, historically been held to possess such immunity when they act in their official capacities,[4] and this Court concludes that

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4.Judges have absolute immunity from damage liability for actions taken in their judicial capacity. Forrester v. White, 484 U.S. 219 (1988). This absolute immunity may be extended to other officials when their activities are integrally related to the judicial process and when they perform a judicial function as an officer of the court. Schinner v. Strathman, 711 F. Supp. 1143 (D.D.C. 1989) (psychiatrist appointed to determine defendant's mental competency to stand trial). See, e.g., Imbler v. Pachtman, 424 U.S. 409, 430 (1976) (prosecutors); Crosby-Bey v. Jansson, 386 F. Supp. 96, 98 (D.D.C. 1984) (probation officer); Simons v. Bellinger, 643 F.2d 774 (D.C. Cir. 1980) (court-appointed committee monitoring unauthorized practice of law); Wolff v. Faris, 1989 U.S. Dist. LEXIS 8520 (N.D. Ill. July 19, 1989) (conciliator in custody dispute); Howard v. Drapkin, 222 Cal. App. 3d

court- appointed arbitrators, mediators, case evaluators, and others who are directly involved in ADR programs with express authority from the court may properly invoke the same protection, for similar reasons.

In the instant case it appears that Mr. Foster was discharging his duty to the Superior Court of the District of Columbia, and acting with the knowledge and approval of the judge by whom he had been appointed, in all the respects with which plaintiff finds fault with his performance. He therefore possesses that court's judicial immunity, and this complaint, and each count thereof must be dismissed as to all defendants.[5]

843, 860 (1990)("[A]bsolute immunity is properly extended to neutral third persons who are engaged in mediation, conciliation, evaluation or similar dispute resolution efforts."); Austern v. Chicago Board Options Exchange, Inc., 898 F.2d 882, 886 (2d Cir.) (arbitrators), cert. denied, 111 S.Ct. 141 (1990).

[5]This Court is unable to perceive any basis upon which plaintiff might have concluded that Mr. Foster's law firm and his partners, as distinguished from Mr. Foster himself,

For the foregoing reasons, it is, this 5th day of February, 1993,

ORDERED, that defendants' motion to dismiss or for summary judgment is granted, and the complaint is dismissed with prejudice.

/s/ Thomas Penfield Jackson

U.S. District Judge

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could be liable to him on the allegations of his complaint. Mr. Foster was acting at all times exclusively as an agent of the Superior Court, without compensation to him or his firm. Accordingly, the Court invites the defendants other than Mr. Foster to apply for sanctions pursuant to Fed. R. Civ. P. 11 if they elect to do so.

APPENDIX C

(Denial of Petition For Rehearing)

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 93-5063 **September Term, 1993**

USDC CV 92-2072

Jerome S. Wagshal,

Appellant,

v.

Mark W. Foster, Roger E. Zuckerman, Roger C. Spaeder, Bruce Goldstein, William W. Taylor, III, Peter R. Kolker, Janet M. Meigurger, Stephen H. Glickman, Lawrence A. Katz, Anthony Thompson, Nelson C. Cohen, Steven M. Salky, Edward C. Berkowitz, Judith Sturtz Karp, Donald J. McCartney, Eric F. Facer, Marshall S. Wolff,

Appellees

BEFORE: Silberman, Williams and Randolph, Circuit Judges

O R D E R

Upon consideration of appellant's petition for rehearing, filed August 15, 1994, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:

RON GARVIN, CLERK

BY:

Robert A. Bonner

Deputy Clerk

APPENDIX D

(Order appointing Foster)

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Civil Division

JEROME S. WAGSHAL	)	
	)	
v.	)	Civil Action No.
	)	90-6155
CHARLES E. SHEETS, et al.)		Civil I-Calendar 3

AMENDED ORDER

(Case Evaluation)

(November 21, 1991)

Having previously appointed a case evaluator, who was later excused from further service, it is this 21st day of November, 1991:

ORDERED that Mark W. Foster, Esq., a member of the firm of Zuckerman, Spaeder, Goldstein, Taylor & Kolker (202-778-1800), is hereby appointed as the Case Evaluator for this matter; and it is

FURTHER ORDERED that

[Provisions relating to functions of the Evaluator, and duties of counsel and the parties omitted.]

FURTHER ORDERED that the confidentiality of the Evaluation be governed by the Statement of Understanding which shall be signed by all parties and counsel; and it is

FURTHER ORDERED that the Evaluator may consult with the Court regarding matters of timing and procedure; and it is

FURTHER ORDERED that Mr. Kaplan may furnish to Mr. Foster all documents provided to Mr. Kaplan in his capacity as case evaluator, in which event the parties need not provide to Mr. Foster documents previously given to Mr. Kaplan.

/s/ _____.

RICHARD A. LEVIE

Associate Judge

Signed In Chambers

Copies mailed to:

[copies to counsel and appointees]

APPENDIX E

(Statement of Understanding)

CALENDAR #_____

MULTI-DOOR DISPUTE RESOLUTION DIVISION

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

STATEMENT OF UNDERSTANDING: MEDIATION AND CASE EVALUATION

Please Note: This form will be signed by all individuals immediately prior to the beginning of the mediation or case evaluation session.

The mediator or case evaluator indicated below has been assigned to facilitate your case. He/she will serve as a neutral party to help you resolve your dispute. He/she will not act as an attorney or advocate for any party.

If you do not have an attorney with you today, you may wish to consult an attorney or consider having an attorney independently review any written settlement statement before you sign. If you do not wish to have

your agreement reviewed by an attorney, you are not required to do so.

The parties and attorneys whose signatures appear below agree that all proceedings at their settlement conference, including any statement made or document prepared for the conference by any party, attorney or other participant, are privileged and shall not be disclosed in any subsequent proceeding or document or construed for any purpose as an admission against interest. The phrase "document prepared for the conference by any part, attorney or other participant" shall not be deemed to apply to any settlement agreement that may result from their conference. No party shall be bound by anything said or done at the conference unless a settlement is reached. if a settlement is reached, the agreement shall be reduced to writing and, when signed, shall be binding upon all parties to the agreement. The parties agree not to subpoena the

evaluator or mediator or any documents submitted to the mediator or evaluator. In no event will a mediator or evaluator voluntarily testify on behalf of a party.

Please sign below to acknowledge that you have read and understand this Statement.

[signatures of plaintiff] [signature of Wagshal] "Neutral" Foster]

Signed because of 11/21/91

Order requiring signature

[signature of plaintiff's attorney

Date: January 30, 1992

Wagshal et al Civil Action No. 90-CA 06155

vs. Sheetz et al.

APPENDIX F

(Foster's letter to the Court - "The Foster Court letter")

[Letterhead of Zuckerman, Goldstein, Taylor & Kolker]

February 19, 1992

BY TELECOPIER AND REGULAR MAIL (202) 879-7031

The Honorable Richard A. Levie
Associate Judge
Superior Court of the District of Columbia
500 Indiana Avenue, N.W.
Washington, D.C. 20001

Wagshal v. Sheetz, C.A. No. 90-CA06155

Dear Judge Levie:

On November 21, 1991, you issued an order appointing me to serve as Case Evaluator for the above-referenced matter in the place of Warren Kaplan, whose neutrality in the matter had been challenged by the plaintiff, Jerome S. Wagshal. Thereafter, I arranged for the transfer of Mr. Kaplan's files to this office, made an extensive

review of the file and conducted a half day mediation session with the parties on January 30, 1992. As a result off that mediation session, I felt there was a realistic chance that the case might be settled by mediation and that, even if no settlement were to eventuate, an attempt should be made to agree upon phased discovery in the case.

Accordingly, I scheduled a follow-up session for February 20, 1992, this time for a full day.

In the interim between the two mediation sessions, I received a letter from plaintiff's counsel challenging my neutrality in this matter on account of various connections between this firm and the Home Insurance Company. I responded by detailing as best I could the exact nature of those connections and insisting that plaintiff and his counsel either waive any objection or consent to my going forward. Their consent has not been forthcoming, and, given the

prior history of this case, I feel that I must recuse myself and recertify this matter to you. My files in this matter are quite well organized and can he transferred to another mediator of your choice upon short notice.

Based upon the knowledge that I have obtained in this case up to this point, I strongly urge you to order Mr. Wagshal, as a pre-condition to any further proceedings in his case, to engage in a good faith attempt at mediation. In my view, and based upon my experience as a Superior Court mediator, this is a case that can and should be settled if the parties are willing to act reasonably. Even if no settlement is forthcoming, this case can surely benefit from some agreed-upon phased discovery rather than an unregulated discovery free-for-all.

Mr. Wagshal has now challenged two neutral mediators appointed by this court, in both cases on grounds that can be

characterized as attenuated. It seems to me that Mr. Wagshal ought to be required to fulfil his obligations under the court's rules concerning mediation before he is allowed to proceed with his suit. You may also wish to consider who should bear the defendant's costs in participating in two aborted mediations. I very much regret the time that has now been wasted by my predecessor, Mr. Kaplan, and by all counsel and their clients as a result of this second failure to complete scheduled mediation.

If I can be of any further assistance, please feel free to call me.

Sincerely yours,

/s/

Mark W. Foster

cc: Brian W. Shaughnessy, Esquire (by telecopier)

Carol Ann Petren, Esquire (by telecopier)

Brian R. Zapp, Esquire (by telecopier)

Ira T. Kasden, Esquire (by telecopier)

APPENDIX G

(Foster's letter to counsel - "The Foster' Counsel letter")

[Letterhead of Zuckerman, Goldstein, Taylor & Kolker]

February 19, 1992

BY TELECOPIER AND REGULAR MAIL (202) 371-9046

[Addressed to all four counsel in the case.]

Wagshal v. Sheetz, C.A. No. 90-CA06155

Dear Counsel:

I regret to inform you that I must cancel our scheduled mediation session now scheduled for Thursday, February 20, 1992.

On February 5, 1992, Mr. Shaughnessy, acting on behalf of the plaintiff, sent me a letter challenging my impartiality in this case on the grounds that our firm had what he characterized as "general and continuing obligations" to the Home Insurance company, which is the underwriter on Mr. Clarke's policy.

On February 12, 1992, I responded to Mr. Shaughnessy setting forth all of the connections of any kind between this law firm and the Home Insurance Company of which I am, after inquiry, aware. I insisted that Mr. Shaughnessy's client take a position as to whether he was challenging my ability to serve in this matter by noon on Tuesday, February 18, 1992. My letter to Mr. Shaughnessy stated that, if no response was received waiving the objection by that time, I would take it that Mr. Shaughnessy and his client objected to my continuing to serve as a neutral mediator. I had no response from Mr. Shaughnessy by the deadline set. I did receive a response filed out of time in which Mr. Shaughnessy and his client continue to attempt to straddle the issue by casting on me the burden of a sort of voir dire process. I am not satisfied by this attempt to "conditionally object" to my objectivity so that, if the mediation

process does not go as he wishes, Mr. Wagshal can attack my impartiality at a future point. Thus, by the terms of my letter to Mr, Wagshal, I am forced to recertify this case to Judge Levie and to urge him to appoint a successor mediator. A copy of my letter to the judge is enclosed.

I genuinely regret the expense and inconvenience that this has caused your clients, but I feel that, in view of the position that Judge Levie took in response to Mr. Shaughnessy's Motion to Disqualify Mr.. Kaplan, I have no choice in the matter.

Sincerely yours,

/s/

Mark W. Foster

Enclosure